

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲
BEFORE THE SECRETARY OF STATE STATE OF COLORADO IN THE MATTER OF THE COMPLAINT FILED BY NANCY C. JOHNSON REGARDING ALLEGED CAMPAIGN AND POLITICAL FINANCE VIOLATIONS BY JEFFERSON COUNTY REPUBLICAN CENTRAL COMMITTEE	
AGENCY DECISION	

INTRODUCTION

This matter is a consolidated complaint pursuant to Colo. Const. art. XXVIII, sec. 9(2)(a) and the Fair Campaign Practices Act ("FCPA"), Section 1-45-101, C.R.S. *et seq.* Hearing was held December 4, 2008 at the Office of Administrative Courts ("OAC") before Administrative Law Judge ("ALJ") Ted A. Krumreich. The Complainant Nancy C. Johnson, Esq. represented herself. Ryan R. Call Esq. appeared on behalf of the Defendants Jefferson County Republican Committee ("Committee")

This case concerns the failure of the Defendants to list the occupations and employers of 136 contributors of \$100 or more as required by Section 1-45-108(1)(a)(II), C.R.S., Colo. Const. art. XXVIII, sec. 7 and Colorado Secretary of State rule 4.9.2. Complainant also alleges that two reports required to be filed by the Committee were not filed timely as required by Section 1-45-108(2)(a)(I)(B).

All rules of the Secretary of State are found at 8 CCR 1505-6 and will be cited by rule number only. The applicable sections of the Colorado Constitution will be cited by article and section. The applicable section of the FCPA will be cited by section.

The contributions were made in support of the Committee's activities to influence or attempt to influence the election of candidates for public office within Jefferson County.

At hearing, the ALJ accepted the Stipulation of the parties dated December 4, 2008 stipulating to certain facts and admission of documentary evidence. Also at hearing, pursuant to the parties Stipulation, the ALJ admitted into evidence Defendant's Exhibits A through D-2.

FINDINGS OF FACT

Based upon the evidence presented at hearing, the ALJ finds as fact:

1. The Committee is a local political party committee affiliated with the Republican Party as defined in Art. XXVII, Section 2 (13) and Section 1-45-103(15), C.R.S. The principle purpose of the Committee is to influence or attempt to influence the election of candidates for public office within Jefferson County.

2. Primary Election Day for the 2008 primary election was August 12, 2008.

3. Complainant filed two formal complaints with the Secretary of State dated October 1, 2008 pursuant to Rule 6.3 alleging that the Committee had violation certain provisions of the Constitution and the FCPA. Each complaint was sent to the Committee by U.S. Mail and received by the Committee on October 8, 2008.

4. Prior to its receipt of the complaints filed by Complainant, the reports filed by the Committee with the Secretary of State had not been examined or reviewed by employees of the Secretary of State and the Committee was not notified of any potential violations prior to the receipt of the formal complaints filed by Complainant.

5. It is the practice at the Secretary of State's office to from time to time examine the filings made under Section 1-45-108 and to provide written notification to a person or committee in accordance with Section 1-45-109(4)(b), C.R.S. and Rule 6.1.a of any potential violation. Upon notification from the Secretary of State, the person or committee is given seven (7) business days to correct the filing as allowed by Rule 6.1.b.

6. On an annual basis, the Jefferson County Clerk and Records' office determines whether a political committee, such as "Committee" here, for which the County Clerk's office is the appropriate filing officer under Section 1-45-109(1), C.R.S. is either an "active" or "inactive" committee and sets up the corresponding campaign finance reports and filing deadlines to allow on-line filing of the required campaign finance disclosures for such a committee. The County Clerk's office employee principally responsible for assigning reporting schedules for committees on an annual basis is Edna Dell, Admin Specialist 2.

7. On January 25, 2008, Edna Dell, in her capacity with the County Clerk's office, assigned the Committee as an "inactive" political party committee for the year 2008. As a result, the corresponding reports assigned to Committee in the Secretary of State's on-line filing system permitted the Committee to file only an annual report that was due November 3, 2008.

8. On August 20, 2008 Ms. Dell contacted the Secretary of State's office via e-mail to request assistance in locating the Committee on the campaign finance page of the Secretary of State's website. On August 26, 2008 Ms. Dell requested assistance from the Secretary of State's office to change the filing status and required reports previously assigned to the Committee as an "inactive" committee to those for an "active" committee.

9. On August 26, 2008 with assistance from the Secretary of State's office with Jefferson County Clerk's office changed the status of the Committee from "inactive" to "active" and set up the campaign finance reports in the on-line filing system corresponding to an "active" political party committee. Previous entries made by the Committee into the on-line system in preparation for filing an annual report were transferred to a report set up in the system on August 26, 2008 as having been due July 22, 2008. In addition, a report was generated and assigned to the Committee to be due August 8, 2008.

10. Shirley Herber is the Treasurer of the Committee and is principally responsible for filing all required campaign finance reports and disclosures for the Committee.

11. Based upon information provided to her by Ms. Dell from the County Clerk's office, Ms. Herber thought that the only report due from the Committee was the annual report due in November 2008. Ms. Herber relied on this information as well as the reporting information for the Committee on the Secretary of State's on-line system to determine when the required report(s) were due. Prior to August 26, 2008, Ms. Herber was not aware that reports were due on July 22 and August 8, 2008 because prior to that time the Committee was still listed as an "inactive" committee with the Secretary of State.

12. Upon becoming aware on August 26, 2008 that reports had been due on July 22, 2008 and August 8, 2008 Ms. Herber completed the July 22, 2008 report and filed it electronically on September 3, 2008. The report due August 8, 2008 was filed electronically on September 13, 2008.

13. At Schedule A of the July 22, 2008 report Ms. Herber provided an itemized listing of contributions of \$20.00 or more. For those contributions of \$100.00 or more, Ms. Herber listed the employer and occupation of each contributor as "N/A". Ms. Herber did so because she believed that she only needed to provide this information for a contributor of \$500.00 or more and because the on-line reporting system allowed her to use the entry "N/A" without creating any type of error message or other notification that this information was required to be provided for the contributions of \$100.00 or more. Ms. Herber made similar entries on Schedule A of the August 8, 2008 report listing the employer and occupation of contributors of \$100.00 or more as "N/A".

14. Upon receipt of Complainant's complaint on October 8, 2008, Ms. Herber on behalf of the Committee filed an Adjustment Report with the Secretary of State's office on October 11, 2008. Ms. Herber 'adjusted' 136 entries for contributors of \$100.00 or more to list the employer and occupation of each such contributor. The total value of these contributions was \$27,362.27.

15. The names of some of the contributors whose occupation and employer were not disclosed in the original July 22 and August 8 filings were persons who are well known in the community such as current political office holders, prominent former holders of political office and even Ms. Herber herself.

16. Vincent Todd is the Secretary of the Jefferson County Democratic Party Committee. Mr. Todd testified, and it is found, that the Jefferson County Clerk's office similarly did not reset the reporting status for the Democratic Party Committee from "inactive" to "active" status. As a result, when Mr. Todd attempted to file a report using the Secretary of State's on-line system on July 22, 2008 the report was rejected.

17. The Committee has not returned any of the contributions reported on the September 3 and September 13, 2008 reports.

CONCLUSIONS OF LAW

The applicable legal standard:

1. Regarding the disclosure of the identity of the employer and occupation of contributors, Section 1-45-108(1)(a) provides in pertinent part:

1-45-108. Disclosure.

(1) (a) (I) All political committees ... shall report to the appropriate officer their contributions received

(II) In the case of contributions made to a political committee ... the disclosure required by this section shall also include the occupation and employer of each person who has made a contribution of one hundred dollars or more to such committee or party.

Also, Colo. Const. art. XXVIII, sec. 7 provides in pertinent part:

The disclosure requirements of section 1-45-108, C.R.S., or any successor section, shall be extended to require disclosure of the occupation and employer of each person who has made a contribution of one hundred dollars or more to a political committee ...

The rule of the Secretary of State significant for this issue is Rule 4.9.2. that provides:

If occupation and employer information as required by Article XXVIII, Section 7 is not provided, and the committee is unable to gather the information within 30 days after receipt of the contribution, the contribution shall be returned to the contributor no later than the 31st day after receipt.

2. Regarding the time period for filing reports, Section 1-45-108(2)(a)(I)(B) provides:

Except as provided in subsections (2.5), (2.7), and (6) of this section, such reports that are required to be filed with the secretary of state shall be filed:

On the first Monday in July and on each Monday every two weeks thereafter before the primary election.

3. Regarding the notification of any deficiencies in filings, the following provisions are applicable:

Section 1-45-109(4)(b) provides:

Any report that is deemed to be incomplete by the appropriate officer shall be accepted on a conditional basis and the committee... shall be notified by mail as to any deficiencies found... The committee... shall have seven business days from the date of mailing such notice to file an addendum that cures the deficiencies.

Rule 6 provides:

6.1 If the appropriate officer, as defined in Section 2(1) of Article XXVIII, discovers a possible violation of Article XXVIII or Title 1, Article 45, and no complaint alleging such violation has been filed with the secretary of state pursuant to Article XXVIII, Section 9(2)(a), then the appropriate officer shall:

a. Provide the person believed to have committed the violation with written notice of the facts or conduct that constitute the possible violation, and

b. Allow seven business days to correct the violation or to submit written statements explaining the reasons that support a conclusion that a violation was not committed

4. Regarding the appropriate sanctions for violations of Art. XXVIII or the FCPA, the following provisions are considered:

Section 10 of article XXVIII sets out sanctions that the “appropriate officer” is to impose for violations of certain portions of article XXVIII and the FCPA:

(1) Any person who violates any provision of this article relating to contribution or voluntary spending limits shall be subject to a civil penalty of at least double and up to five

times the amount contributed, received, or spent in violation of the applicable provision of this article.

(2)(a) The appropriate officer shall impose a penalty of fifty dollars per day for each day that a statement or other information required to be filed pursuant to section 5, section 6, or section 7 of this article, or sections 1-45-108, 1-45-109 or 1-45-110, C.R.S., or any successor sections, is not filed by the close of business on the day due.

Section 9 of article XXVIII is the process by which persons who believe there has been a violation may file a written complaint with the Secretary of State. The Secretary of State is then required to refer the matter for a hearing before an ALJ. If the ALJ finds that a violation has occurred, the ALJ is to render a decision including “any appropriate order, sanction, or relief authorized by this article.” Colo. Const. art. XXVIII, sec. 9(2)(a).

The violations:

5. Complainant first argues for a sanction against the Committee because the required information concerning employer and occupation of contributors of \$100.00 or more was not disclosed in the reports filed by the Committee on September 3 and September 13, 2008. Complainant argues that because this information was not provided and the contributions were not returned within 31 days the contributions then become essentially illegal contributions because they were not returned to the contributors. Complainant then urges that the provisions of Section 10(1) of art. XXVIII apply and that a civil penalty of between two and five times the value of the contributions should be levied against the Committee. The ALJ disagrees with this analysis and declines to impose a penalty under Section 10(1).

6. As cited above, Rule 4.9.2 requires the contributions to be returned if the Committee is “unable” to gather the required information on the employer and occupation of contributors of \$100.00 or more. Here, the Committee was not unable to gather this information. The record reflects that within 3 days of being notified of the potential violation upon receipt of Complainant’s complaint, an addendum report was filed including the information on the employer and occupation of each of the 136 contributions at issue. Further, as found, at least some of the contributions were from persons whose employer and occupation would be either commonly known or easily discovered. Because the Committee was not “unable” to gather the information on employer and occupation, the Committee was not required by Rule 4.9.2 to return the contributions. As such, the Committee did not violate any provisions of art. XXVIII relating to contribution or spending limits and the penalty under Section 10(1) is not applicable. The violation here was one of an improper disclosure not the receipt of or expenditure of improper campaign finance funds.

7. The Committee argues that it should have been allowed seven business days to correct the filing without the imposition of a penalty. For this argument, the Committee points to the provisions of Section 1-45-109(4)(b) and Rule 6.1. The ALJ concludes that these provisions are inapplicable. The informal procedure of the

Secretary of State in excusing violations if they are corrected within seven days and the provisions of rules 6.1 above are not controlling. The failure to disclose was not discovered as part of an internal Secretary of State review. Also, rule 6.1 is explicitly inapplicable where, as here, there has been a complaint pursuant to Section 9(2)(a).

8. The ALJ concludes that the sanction provisions of Section 10(2) of art. XXVIII as modified by Section 9(2)(a) are applicable. Under Section 10(2) a penalty of \$50.00 per day could be imposed. The Committee first learned on August 26, 2008 that the reports were required. The required information on employer and occupation was not disclosed until the addendum report of October 11, 2008, a period of 46 days. Thus, under the provisions of Section 10(2) the penalty would be \$2,300.00 (46 x \$50.00). The provisions of Section 10(2) refer to the "appropriate officer" who shall impose the penalty described above. The ALJ to whom a complaint is referred for hearing under Section 9(2)(a) is not an "appropriate officer" as that term is used in art. XXVIII. Further, Section 9(2)(a) vests the ALJ with discretion to include "any appropriate order sanction or relief authorized by this article". The provisions of Section 9(2)(a) from which an ALJ receives the grant of authority to impose a sanction do not specifically mandate the imposition of the penalty described in Section 10(2) applicable to sanctions imposed by an "appropriate officer". The ALJ concludes that a lesser sanction may be imposed than that described in Section 10(2) if the ALJ determines the lesser sanction to be appropriate under the circumstances.

9. The ALJ determines that the appropriate sanction for the failure to disclose the employer and occupation information is \$680 (136 contributors x \$5.00). The ALJ determines that this lesser sanction and penalty is appropriate as the omitted information on employer and occupation was disclosed within three days of the time the Committee learned of the complaint and their mistaken impression that the required disclosure applied only to contributions of \$500.00 or more. The ALJ also considers the fact that at least some of the names of contributors were those of persons whose employer and occupation would be easily known or discernable to the public who might access the reports filed by the Committee. (e.g. Wayne Allard).

10. Complainant next argues that a sanction should be imposed against the Committee because the reports due July 22, 2008 and August 8, 2008 were not filed when due. The ALJ declines to impose a sanction under the circumstances of this case. Until August 26, 2008 Ms. Herber reasonably believed that only an annual report was required and that the report was not due until November 2008. For this understanding Ms. Herber reasonably relied upon information provided to her from Ms. Dell at the County Clerk's office and the reporting times listed for the Committee on the Secretary of State's on-line filing system. The error in the reporting times was due to Ms. Dell's failure to change the status of the Committee from "inactive" to "active" and generate the correct corresponding reporting time frames in the Secretary of State's system. The same error was made to the Democratic Party's listing. As found, Ms. Herber did not know reports were due on July 22 and August 8, 2008 until August 26, 2008. To penalize the Committee for late filing of reports that they were not aware were required to be filed until after the reports were already due raises clear ex post facto issues. Additionally, once Ms. Herber and the Committee became aware the reports

needed to be filed, they were filed within a time period evidencing due diligence on the part of the Committee to comply with the required reporting.

AGENCY DECISION

It is the Agency Decision that the Defendant Jefferson County Republican Central Committee is liable for a penalty or fine of \$680.00. The fine shall be deposited in the Department of State cash fund created in Section 24-21-104(3), C.R.S.

This Agency Decision is final and will be subject to review by the Court of Appeals, pursuant to Section 24-4-106(11), C.R.S.

DATED: December 8, 2008

Ted A. Krumreich
Administrative Law Judge

CERTIFICATE OF SERVICE

i hereby certify that a true and correct copy of the above **AGENCY DECISION** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Ryan R. Call Esq
Colorado Republican Committee
5950 S. Willow Drive, Suite 220
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Nancy C. Johnson Esq.
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And to:

William A. Hobbs
Deputy Secretary of State
Department of State
1700 Broadway, Suite 270
Denver, CO 80290

DATED: _____

Court Clerk

